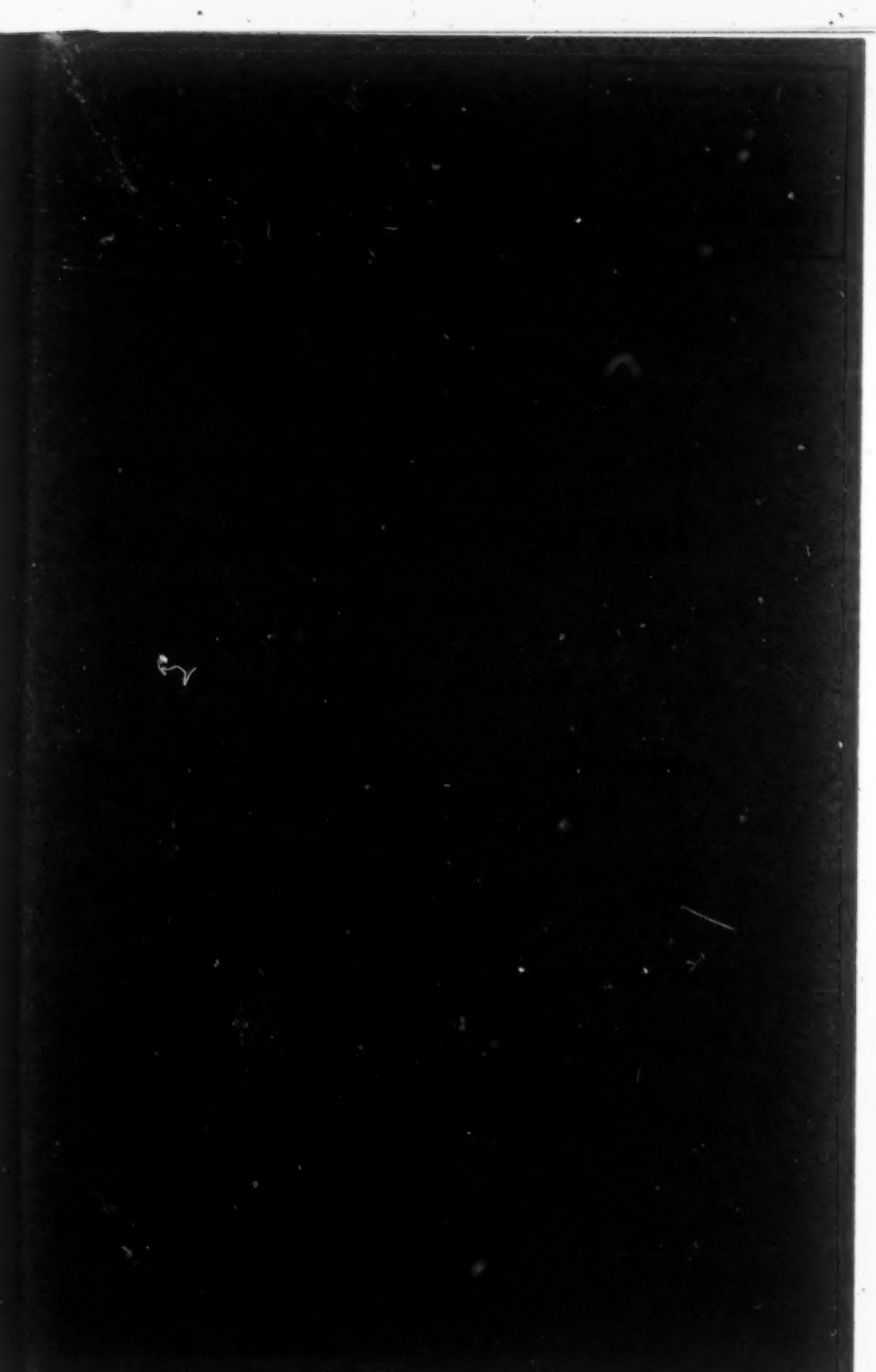
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In the Supreme Court of the United States

OCTOBER TERM, 1937

JOHN A. JOHNSON, PETITIONER

v.

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court's order discharging the writ of habeas corpus and remanding the petitioner (R. 56–57) is based on its opinion reported at 13 F. Supp. 253, discharging a similar writ issued as to the petitioner. The opinion of the Circuit Court of Appeals (R. 65–70) is reported at 92 F. (2d) 748.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 24, 1937 (R. 70). The petition for a writ of certiorari was filed in this Court January 13, 1938. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Petitioner was convicted of uttering and possessing counterfeit money. At the trial he was not represented by counsel. The questions are whether, under the circumstances of this case, the conviction was in violation of the Fifth or the Sixth Amendment, and whether, if there were such a violation, the error may be corrected on habeas corpus proceedings.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusaton; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT

The petitioner and one Monroe C. Bridwell were arrested at Charleston, South Carolina, on November 21, 1934, charged with feloniously uttering and passing four counterfeit $20 Federal Reserve notes

and with knowingly and feloniously possessing 21 Federal Reserve Bank notes with intent to defraud. A hearing was held by the United States Commissioner at which they were bound over to wait the action of the grand jury and were confined in the local jail in the absence of bail (R. 5, 66). At the hearing petitioner and Bridwell were represented by counsel, who continued to represent them until the 14th of the following January (R. 5, 41, 44.) An indictment in two counts was returned against petitioner and Bridwell at the next term of court (R. 53–55). On January 23, 1935, petitioner and Bridwell were brought to court, pleaded not guilty, and were tried to a jury, which returned a verdict of guilty (R. 20, 23, 55). Petitioner was sentenced to imprisonment for four years and six months. No appeal was taken from this sentence (R. 21, 55). In June, 1935, petitioner, being confined in the United States Penitentiary at Atlanta (R. 7–8, 18, 56), filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia (R. 7). The court appointed counsel to represent him, and on December 19, 1935, the petition was denied (R. 8; 13 F. Supp. 253). In December, 1936, the petition for a writ of habeas corpus which is the subject of this appeal was filed (R. 4–9). On April 3, 1937, the second writ of habeas corpus was discharged and the petitioner remanded to the custody of the respondent, the court holding that the case did not substantially differ from the previous one (R. 56–57).

Both petitioner and Bridwell appealed to the Circuit Court of Appeals for the Fifth Circuit. The appeals were consolidated and heard on the same record (R. 2–3, 65–66). On November 24, 1937, that court affirmed the judgment of the District Court. Bridwell is not a party to the petition to this Court for a writ of certiorari (R. 52), having been released on parole.

The basis of the petition for writ of habeas corpus below and for the writ of certiorari in this Court is that the right to the assistance of counsel accorded petitioner by the Fifth and Sixth Amendments was denied, thus rendering the judgment on which he stands committed null and void. The record, in its aspect most favorable to the petitioner, may be summarized as follows:

Petitioner and Bridwell were arrested on November 21, 1934 (R. 5). The next day they retained counsel and paid him a fee of $100 (R. 43). He represented the prisoners at the hearing before the United States Commissioner (R. 43–44). The Commissioner bound them over for the grand jury; they remained in jail because unable to give bond (R. 5). The counsel visited them two or three times in jail. He advised them to plead guilty. They refused. According to Bridwell's testimony, counsel refused to represent them if they would not plead guilty and if they could not get any money. On January 14, 1935, counsel withdrew from the case (R. 44).

On January 21, 1935, petitioner and Bridwell were indicted by the grand jury. Their petition and testimony is to the effect that they were not informed of this indictment until they were called for trial on January 23, 1935 (R. 5, 48–49). At the trial the court read the indictment to the defendants, and they pleaded not guilty (R. 29). The judge asked them if they had counsel, to which they replied that they had not. The court did not offer to appoint counsel or advise the defendants that they had a right to have counsel appointed (R. 5–6). Petitioner and Bridwell testified on the habeas corpus proceeding that Bridwell requested the District Attorney for counsel, and that he replied that in South Carolina counsel was not appointed except in capital cases (R. 41, 45, 49). The United States Attorney denied that any request for counsel was made (R. 23, 28). The clerk of the court recalled no request made of anyone, and is sure that none was made of him (R. 21). The Assistant United States Attorney stated that no request for counsel was made of him (R. 33). The court asked the prisoners if they were ready to go to trial (R. 27); they replied that they were (R. 27), or that they were as ready as they could be (R. 42).

During the course of the trial Bridwell acted as attorney for himself and petitioner. He testified in his own behalf, questioned witnesses for the Government, and addressed the jury at the close of the

case (R. 25, 33). Bridwell testified that he objected to the testimony of one witness because it was false and that his summation was limited to fifteen or twenty words. He also testified that he asked the District Attorney if he could get witnesses, and that he was told that it was too late (R. 46, 47). The United States Attorney testified that he was not asked by the defendants to have witnesses subpoenaed (R. 23, 26, 28); the Assistant United States Attorney similarly testified that he was not asked (R. 34). Upon Bridwell's statement that he could not tell that the money was counterfeit, the trial court sent for a deputy sheriff in charge of tax collections, who was familiar with handling money, and who testified that the defendants could have told that the money was counterfeit; the testimony is in conflict as to whether Bridwell or the United States Attorney made the suggestion that one familiar with money be called (R. 34, 46–47). The clerk of the court testified that Bridwell conducted the defense about as well as the average layman (R. 22); the United States Attorney that he showed extraordinary ability for one who was not a lawyer, evidencing a familiarity with the rules of evidence and procedure (R. 25–26); and the Assistant United States Attorney that Bridwell showed a great knowledge, or more knowledge than the normal layman, of court procedure (R. 33). Petitioner was a marine and has had a fifth grade schooling (R. 48); Bridwell was a corporal in the

marine corps and had been educated in a country school until the age of fifteen; he supposed that he had reached the equivalent of the fourth or fifth grade (R. 44, 46). The United States Attorney testified that, because the defendants were without counsel, he took especial pains to see that they had a fair trial, and avoided everything that was even questionable under the law (R. 24–25).

After conviction, the defendants were returned to the county jail at Charleston. Two days later they were taken to the Federal penitentiary at Atlanta (R. 7, 15, 43). Bridwell and petitioner testified that in the interval they repeatedly asked the jailers to communicate with Major Myers, a lawyer; that they asked a telegraph messenger boy to deliver a message to Myers, but that the messenger could not locate him (R. 42–43, 44–45, 49). The county jailer testified that the prisoners did not request him that they be put in touch with a lawyer, although he made a daily inspection of the jail, seeing each prisoner, and that he saw the petitioner and Bridwell frequently (R. 40). The assistant jailers, who were not in Atlanta for the hearing, did not testify.

Upon delivery in Atlanta, the petitioner and Bridwell were quarantined, as is the customary health procedure. They were allowed to write letters during this period (R. 45, 51). Prison records show that Bridwell wrote his first letter on

February 1, 1935, and petitioner on January 28,[1] 1935 (R. 51). Petitioner testified that he had the impression from other inmates that he could not write out about his case (R. 50); Bridwell, that he wanted to wait until he knew a little more about the matter (R. 43, 47). After release from quarantine, one or the other of the prisoners wrote the clerk or the trial judge to get the indictment papers and, subsequently, to ask that the case be appealed (R. 45, 50). The records of the court indicate that the appeals were filed on May 15, 1935 (R. 29). On May 20, 1935, the clerk wrote Bridwell that the petitions for new trial and, if that were refused, for an appeal, were denied by the judge because the court was without jurisdiction (R. 30). The judge directed that this letter be sent and told the clerk the papers were filed too late (R. 37–38).

Bridwell was released on parole on April 23, 1937. Petitioner will be entitled to discharge in July 1938 (R. 52).

ARGUMENT

I

While it may be a wholesome practice to require that every criminal defendant accused of felony must either be represented by or expressly refuse

[1] The record reads February 28, but evidently means January, since the witness spoke of *subsequent* letters on the 7th, 14th, 17th, and 25th of February (R. 51).

counsel,[2] it is relatively clear that there has been no violation of the Fifth Amendment. The Court in *Powell* v. *Alabama,* 287 U. S. 45, set out the factors which shape the decision on this question as follows (p. 71):

> In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.
>
> But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that

[2] Department of Justice Circular No. 2946, dated March 4, 1937, set out in the Appendix, *infra*, pp. 18–19, directs the United States Attorneys to follow such practice.

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; * * *.

Here there was no race prejudice. There was no public hostility, or presence of the military forces. The defendants were not illiterate; their ignorance is at least debatable. This was not a capital case. There is no suggestion that the court or the jury was inflamed or hostile. The absence of each of the factors emphasized in *Powell* v. *Alabama* indicates to us that there has been no denial of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105; *Palko* v. *Connecticut,* No. 135, October Term, 1937.

This view is reinforced by the large number of state cases which hold that the trial court need not assign counsel unless it is requested and a satisfactory showing as to need made. *Bethune* v. *State,* 26 Ala. App. 72, certiorari denied, 228 Ala. 422; *Weatherford* v. *State,* 76 Fla. 219; *Gatlin* v. *State,* 17 Ga. App. 406; *Bailey* v. *State,* 50 Ga. App. 92; *Marovich* v. *State,* 202 Ind. 274; *Grogan* v. *Commonwealth,* 222 Ky. 484; *Holland* v. *Commonwealth,* 241 Ky. 813; *State* v. *Davis,* 171 La. 449; *People* v. *Williams,* 225 Mich. 133; *Dugan* v. *State,*

151 Miss. 781; *State* v. *Terry,* 201 Mo. 697; *State* v. *Steelman,* 318 Mo. 628; *State* v. *Fowler,* 59 Mont. 346; *State* v. *MacKinnon,* 41 Nev. 182; *State* v. *Raney,* 63 N. J. L. 363; *United States* v. *Go-Leng,* 21 Phillip, Rep. 426; *State* v. *Jones,* 172 S. C. 129; *State* v. *Sweeney,* 48 S. D. 248; *Brady* v. *State,* 122 Tex. Crim. App. 275; *Barnes* v. *Commonwealth,* 92 Va. 794; *State* v. *Yoes,* 67 W. Va. 546; *James* v. *State,* 27 Wyo. 378. The courts of only one jurisdiction, so far as we have found, hold, in the absence of a specific statute, that it is incumbent upon the trial judge to inform the defendant of his right to counsel. *Commonwealth* v. *Richards,* 111 Pa. Super. 124; *Commonwealth* v. *Valerio,* 118 Pa. Super. 34; *Commonwealth* v. *Cohen,* 123 Pa. Super. 5.

In view of this widely accepted rule, with so little authority to the contrary, it seems difficult to hold the failure to assign counsel, in the absence of a request, to be a violation of due process. At the very most, it might be thought to be in the category where there would be a denial of due process if the defendant could show that he was prejudiced by the absence of counsel to represent him. Compare *Snyder* v. *Massachusetts, Palko* v. *Connecticut,* both *supra.* Here the petition for a writ of habeas corpus, the evidence and the petition for certiorari are all silent as to any claim that the presence of counsel would have altered the result of the trial.

II

Petitioner's principal contention is that there has been a violation of the Sixth Amendment. It seems, however, in the view which must be taken of the evidence in this case, that there has been no such violation.

1. This Court has indicated that the right to assistance of counsel, guaranteed by the Sixth Amendment, may be waived. *Schick* v. *United States,* 195 U. S. 65, 72; *Patton* v. *United States,* 281 U. S. 276, 310. Whether the right has been waived in this case depends upon the conclusion to be drawn from the record. The evidence is compatible with either view, and there has been no ruling of a trial court to resolve the conflicting testimony. In *Bridwell* v. *Aderhold,* 13 F. Supp. 253 (N. D. Ga.), the court did not pass on the conflict in testimony, but held (1) that counsel was required in any event, but that (2) habeas corpus proceedings were insufficient to reach this error since the court had jurisdiction. This decision was followed in the present proceeding (R. 56–57).

The undisputed evidence shows that petitioner and Bridwell had counsel at the hearing before the Commissioner and thereafter but that he withdrew before their trial. At this trial they were not represented by counsel and were not asked if they wanted counsel. The court read the indictment to the defendants; they were asked if they had counsel, to which they answered no; and they were

asked if they were ready for trial, to which they replied in the affirmative. Bridwell conducted a defense for the defendants. This skeleton of the events is clear from the undisputed testimony.

A waiver could reasonably be inferred from the testimony offered in this case. Petitioner and Bridwell well understood the desirability of counsel; they retained one the day after arrest. He advised them to plead guilty. They refused and he withdrew. Bridwell seems to have had a knowledge of legal procedure at least the equivalent of that of the ordinary layman. Yet, according to the testimony for the Government, they made no request for counsel before or during the trial. This failure even to inquire as to the possibility of having counsel assigned might well indicate a deliberate choice to forego the assistance of counsel.

If, on the other hand, the testimony of petitioner and Bridwell were believed, there was no waiver of the right to be assisted by counsel. Because they did not know of their indictment, they made no request for counsel before the day of their trial. At the trial they asked the United States Attorney as to their right to counsel; he said they were not entitled to this. They were also told it was too late to subpoena witnesses. The defense conducted by Bridwell was inadequate. Their repeated requests of the jailers, after conviction, for contact with counsel were ignored.

If the petitioner's testimony were believed, we would assume that his conviction was in violation

of the Sixth Amendment. But neither the Government nor this Court is entitled to accept this testimony as true. In its crucial parts it is flatly contradicted by the United States Attorney. He is not only an officer of the court in which the trial was had but an officer of the United States. It seems evident that much more than the testimony of interested co-defendants would be required to refute his evidence.

2. It must, therefore be taken as established that the defendants made no request for counsel. The question which remains is whether, in a non-capital felony case, the failure of the court to assign counsel in the absence of a request by the defendants violates the Sixth Amendment.

If the matter were to be decided as an original proposition, without reference to history or to the decisions of other courts, it might be held that the failure of the defendants to request counsel would not be a waiver of the rights secured under the Sixth Amendment. Criminal defendants will often be ignorant of their rights and the constitutional protection may at times be drained of content if the defendant must himself take the initiative. But we conclude that the Sixth Amendment cannot be stretched to place an imperative duty on the trial court either to assign counsel or to obtain an express waiver from every unrepresented defendant.

a. The origin of the provision seems clear. It was designed to provide a guaranty against trans-

planting the practice of English treason cases, where the accused was denied the privilege of representation by counsel. See *Patton* v. *United States,* 281 U. S. 276, 307. Directed against this abuse, the clause can hardly be supposed to place upon the court the *duty* of insuring that the defendant has counsel.

b. The first ten Amendments to the Constitution were proposed by Congress [3] in September 1789 (1 Stat. 97). A few months later, on April 30, 1790, Congress enacted that persons accused of crime should have the privilege of counsel and that in treason and other capital crimes the court should assign counsel if the defendant were not represented (c. 9, Sec. 29, 1 Stat. 112, 118; R. S. Sec. 1034; U. S. C., Title 18, Sec. 563). It is most unlikely that Congress would have made this provision if an amendment shortly to be ratified would have made assignment of counsel compulsory in all criminal cases.

c. The decisions of state courts, discussed above (pp. 10–11), were all made under constitutional provisions more or less comparable to the Sixth Amendment. If eighteen state courts are of the view that a constitutional provision guaranteeing the privilege of representation by counsel does not require that the judge assign counsel in the absence of a request, while the courts of only one State hold

[3] The debates on the proposal which became the Sixth Amendment disclose nothing relevant to the present question. 1 Debates in Cong. (O. S.) 784–785.

to the contrary, it is difficult to urge that this Court should construe the Federal Constitution differently.

3. Accordingly, the Government is of the view that the Sixth Amendment is not violated unless the defendant requests and is refused the assignment of counsel. While we are not satisfied with the ambiguities contained in this record, it seems clear that the testimony of petitioner cannot be accepted in the face of the contradictory testimony of the United States Attorney, and it must be taken that there was no request for the assignment of counsel.

III

The court below held that habeas corpus could not be substituted for appeal except in extraordinary circumstances (R. 69). This is the rule that has heretofore obtained. Even the cases, *Moore* v. *Dempsey,* 261 U. S. 86, and *Mooney* v. *Holohan,* 294 U. S. 103, which are the outstanding exceptions to the rule were marked by characteristics not evident in the record of the instant case. Each of these cases involved such a departure from the orderly course of an impartial judicial trial as to warrant the inference that there had been a breakdown of the machinery of justice. In each case the result, the conviction, was largely the result of such failure of judicial machinery. In the case at bar there is no sufficient showing in the record that there was a breakdown of judicial procedure whereby the petitioner was convicted of an offense

which he did not commit. There are no "extraordinary circumstances" which might bring this case within the rule of these cases.

If a violation of the Sixth Amendment because of failure to assign counsel were assumed, then, since the absence of counsel would affect the taking of steps for appeal within the prescribed time (Crim. Apps. Rule III), the rule of *Moore* v. *Dempsey* and *Mooney* v. *Holohan* might be applicable so as to admit of habeas corpus proceedings.

CONCLUSION

The only inference which is permitted by this record is that petitioner failed to request that counsel be assigned. The parties are agreed that the trial judge might more appropriately have assigned, or offered to assign, counsel even in the absence of a request. But the failure of the court to assign counsel does not violate the Fifth or the Sixth Amendments. Accordingly, we see no course but respectfully to submit that the petition for a writ of certiorari should be denied.

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FEBRUARY 1938.

APPENDIX

DEPARTMENT OF JUSTICE,
Washington, D. C., March 4, 1937.

Circular No. 2946

To all United States attorneys:

Certain cases have arisen recently indicating that in some instances the District Courts do not appoint counsel for defendants in criminal cases who appear without an attorney, unless the defendant expressly requests such appointment. In most of the Districts, however, it is customary to appoint counsel in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense.

It would seem that the latter procedure is the better practice. When in any given case such practice is not followed, you are directed to bring the matter to the attention of the court, in order that the defendant may have the assistance of counsel for his defense. In the case of *Powell* v. *Alabama*, 287 U. S. 45, the Court said:

> The necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

These words would apply with equal force to the Fifth Amendment. While it may be that the right "to have the assistance of counsel for his defense", which is guaranteed by the Sixth Amendment, may be waived, and while it may be that the practice

followed in most of the jurisdictions is more than a compliance with the constitutional requirement, the Department of Justice is under a particular obligation to see that no man who needs counsel is without such assistance.

HOMER CUMMINGS,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1934